



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1996

Ms. Brenda Jenkins
Executive Director
Public Utility Commission of Texas
7800 Shoal Creek Boulevard
Austin, Texas 78757-1098

OR96-0620

Dear Ms. Jenkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 37909 and 38745.

The Public Utility Commission of Texas (the "commission") received two requests for certain information submitted to the commission in response to Project No. 14559, a proposed rule concerning, among other things, the amount payphone owners may charge for calls. Specifically, the requestor seeks the names of those companies entering into a confidentiality agreement with the commission before submitting cost information and the information submitted as confidential. You state that only one company, Southwestern Bell Telephone Company ("Southwestern Bell"), entered into such an agreement with the commission. You further state that the commission takes no position regarding the disclosure of the requested information. However, you have requested a decision from this office because third party proprietary interests are implicated. *See* Gov't Code § 552.305(a). You also state that you informed Southwestern Bell of the request for information.

This office notified Southwestern Bell of the request for information and provided the company an opportunity to demonstrate to this office that the information is excepted from required public disclosure. Southwestern Bell contends that the requested information may be withheld from required public disclosure under sections 552.104 and 552.110. In addition, Southwestern Bell notes that the requested information was furnished to the commission under a confidentiality agreement.

Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the commission does not raise section

552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body).

Although Southwestern Bell claims the confidentiality agreement makes the information confidential, the agreement specifically provides that the commission will not disclose the information "except pursuant to a proper request under the Texas Open Records Act" and a determination by the Office of the Attorney General. Moreover, governmental bodies may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. Open Records Decision Nos. 444 (1986), 437 (1986), 425 (1985).¹

Section 552.110 excepts "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110, commercial or financial information obtained from a person and confidential by statute or judicial decision. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

Southwestern Bell has submitted copies of the confidentiality agreements executed by various commission employees with Southwestern Bell, an affidavit from the Director-Public Communications--Market Management, and a pleading and four affidavits concerning a current proceeding with the commission regarding the need for protection of Southwestern Bell's cost studies. We have already addressed and dismissed the applicability of the confidentiality agreements to this information. The affidavit from the Director-Public Communications--Market Management states:

In Texas, [Southwestern Bell] has approximately 100,000 payphones. There are literally hundreds of private payphone providers accounting for approximately 36,000 payphones. There is no question that there is significant competition in the marketplace today. The cost data [at issue] is one of the most important factors

¹See Open Records Decision Nos. 514 (1988), 484 (1987), 479 (1987) (governmental bodies are prohibited from entering into contracts to keep information confidential); *see also* Open Records Decision Nos. 605 (1992), 491 (1988) (governmental body may not use contract to invoke Gov't Code § 552.101).

that [Southwestern Bell] uses to make significant strategic decisions and thus, should be classified as Highly Sensitive Confidential information. The cost studies contain very finite, detailed information of how [Southwestern Bell] provides its payphone service and the cost for each component of the service. Revealing this type [of] information to actual and potential competitors would place [Southwestern Bell] at a substantial competitive disadvantage. [Southwestern Bell's] competitors could potentially make crucial decisions on pricing, product/service deployment as well as marketing strategy. This clearly means an unfair market advantage. This becomes increasingly important with the increase in local exchange competition as well as with the further growth of competition in other markets [Southwestern Bell] faces.

.... Managing costs, both overall and individual component costs relative to the competition, is a key strategy to any business. Divulging this information, then, would provide an unfair advantage to the competition. In the payphone business, for example, if costs can be kept to a minimum, then overall profits are better and higher commissions can be paid to the location owner, thus securing increased market share. Knowledge of vendor specific information is yet another example of how a competitor could develop successful strategies by negotiating better arrangements with suppliers thereby giving competitors cost advantages that they otherwise would not have achieved under normal business conditions.

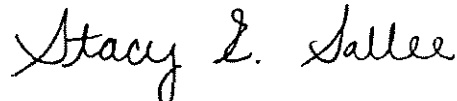
Although the pleading and affidavits do not concern the specific information at issue, Southwestern Bell claims "the cost studies are all prepared in the same organization of [Southwestern Bell] and the same principles relating to the purpose and use of the cost studies apply to all such studies prepared by [Southwestern Bell]." Southwestern Bell further claims that the pleadings and affidavits supports its claim that the cost study information would be of value to its competitors and therefore is confidential.

We have reviewed all of the information submitted by Southwestern Bell, including the requested information. We conclude that Southwestern Bell has established that the submitted information marked "confidential" or "highly sensitive confidential" falls within the second prong of the *National Parks* test. Accordingly, the commission must withhold this information. You do not specifically address the remaining information nor do the affidavits and pleadings demonstrate that the information constitutes a trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The commission may not withhold this information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/LBC/ch

Ref: ID#s 37909 and 38745

Enclosures: Submitted documents

cc: Ms. Janee Briesemeister, Senior Policy Analyst
Consumers Union, Southwest Regional Office
1300 Guadalupe, Suite 100
Austin, Texas 78701-1643
(w/o enclosures)

Mr. Robert F. Schneider, Senior Staff Attorney
Consumers Union, Southwest Regional Office
1300 Guadalupe, Suite 100
Austin, Texas 78701-1643
(w/o enclosures)

Mr. L. Kirk Kridner
Southwestern Bell Telephone
1616 Guadalupe, Room 600
Austin, Texas 78701-1298
(w/o enclosures)